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HIGH COURT OF JUDICATURE CHHATTISGARH : BILASPUR

(DIVISION BENCH)

CORAM: HON'BLE SHRI VIJAY KUMAR SHRIVASTAVA & HON'BLE SHRI DHIRENDRA MISHRA, JJ

TAX CASE NO. 41 OF 2006

Appellants : 1. M/s. R.K. Polytubes, 26, Industrial Growth Centre, Borai, Distt. Durg (C.G.), (Through its Partner Shri Ravi Gupta, S/o Late Shri Bhola Prasad Gupta, Aged about 40 years)

2. M/s. Fairdeal Agencies, Kalpana House Station Road, Durg (C.G.) (Through its Partner Shri Prakash Gupta, S/o Late Shri Bhola Prasad Gupta, Aged about 41 years)

VERSUS

Respondents : 1. Union of India-Through the Secretary Ministry of Finance, Department of Revenue, North Block, New Delhi - 110 001.

2. Customs, Excise and Service Tax, Appellate Tribunal, Through Assistant Registrar, West Block No.2 R.K. Puram, New Delhi – 110 066.

3. Commissioner of Central Excise, New Central Excise Building, Dhamtari Road, Tikrapara, Raipur (Chhattisgarh)

Present:- Shri P. Diwakar, learned Sr. Advocate with Shri P.K. Bhaduri, learned counsel for the petitioners.

Shri Bhishma Kinger, learned Standing Counsel for Union of India/respondents.

(ORAL ORDER)
(Passed on 08th January 2007)

The following oral order of the Court was passed by **Vijay Kumar Shrivastava, J.**

154

This appeal under Section 35-G of the Central Excise Act, 1944 (henceforth 'the Act') has been preferred against the orders passed by Custom, Excise and Service Tax Appellate Tribunal, New Delhi (henceforth referred to as 'Tribunal') dated 25.4.2006 and 7.8.2006 whereby the Tribunal vide order dated 25.4.2006 granted conditional stay and vide later order dismissed both the appeals on non-compliance of the condition to make pre-deposit of Rs. 40 lakhs and Rs. 10 lakhs respectively, preferred by the appellants.

Commissioner, Custom and Central Excise, passed an elaborate order dated 30.11.2005 whereby imposed central excise duty of Rs. 69,74,004/- and a penalty of the same amount on appellant No. 1 and a penalty of Rs. 22,00,000/- on appellant No. 2. Feeling aggrieved, both the appellants preferred excise appeals before the Tribunal bearing Excise Appeal Nos. 411/2006 and 412/2006. Both the appellants filed an application for staying the order of the Commissioner.

The appellants' contention before the Tribunal was that the demand has been based on electricity consumption. On the other hand, the department opposed the same and contended that fixation of duty and penalty is not based on account of electricity consumption but based on various documents establishing production and sale. They exhibited before the Tribunal how without payment of duty, manufactured materials were sold to customers. M/s R.K. Polytubes received raw materials from M/s Alpha Organics and Sigma Chemicals but not accounted for. On the basis of production that was worked out, duty has been calculated.

The Tribunal very meticulously considered contentions raised by both the parties and on perusal of material filed before it, came to know that there is sufficient evidence in the form of document for illicit clearance of goods without clearance of duty by M/s R.K. Polytubes. It was found that for the year 1997-98 the production has been worked out on the basis of electricity consumption, which is taken on the basis of actual production for a certain period and then on the basis of total consumption of electricity, the production was worked out. It was also found that less production than actual is shown in R.G.-I register and the balance quantity has been cleared without accounting for and without payment of duty.

1855

Having considered all the material the Tribunal vide impugned order dated 25.4.2006 directed appellant No. 1 M/s. R.K. Polytubes to pre-deposit an amount of Rs. 40,00,000/- within a period of twelve weeks and report compliance on 7.8.2006 and on such deposit, the recovery of the balance amount of duty and penalty from M/s R.K. Polytubes is waived for the purpose of hearing the appeal and if the said amount is not deposited within the stipulated period, then the appeal shall stand dismissed. Learned Tribunal further directed appellant No. 2 M/s Fair Deal Agencies, to pre-deposit a sum of Rs. 10,00,000/- within a period of 12 weeks with a further direction that if they fail to pre-deposit this amount within the stipulated period, then appeal shall stand dismissed and if the said amount is deposited, recovery of balance amount is waived for the purpose of hearing the appeal.

Both the appellants did not adhere to the interim order passed by the appellate Tribunal as a result of that when the appeals came up for hearing on 7.8.2006, the learned Tribunal dismissed both the appeals for non-compliance of its order dated 25.4.2006 which was a conditional order.

Orders passed by the Tribunal have been made appellable in accordance with Section 35-G of the Act. The period prescribed for appeal is 180 days and the appeal can only be admitted if the Court is satisfied that a substantial question of law is involved in the case. Here in the instant appeal, first order has been passed on 25.4.2006 and when this appeal has been filed, the period of 180 days from 25.4.2006 has elapsed a long back. No application for condonation of delay has been filed, therefore, the order dated 25.4.2006 attained its finality. Subsequent order dated 7.8.2006 has been passed as a result of non-compliance of the earlier order dated 25.4.2006.

The appellants have formulated following substantial questions of law in their memo of appeal:

- Whether the act on the part of the respondent No. 3 of not adducing any evidence with respect to the fact that the appellant has received excess raw-material is acceptable for imposing so heavy a penalty which has resulted into a serious financial hardship to the appellants.
- Whether a firm which is not financially robust and strong can be compelled to comply with so heavy a penalty. It is

submitted that the appellants have accumulated a loss of Rs. 5,68,866.92 and the total fixed assets amounts to Rs. 18.11 laksh only. In such a situation, it is submitted that whether the Appellate Tribunal's stand of ignoring the financial condition notwithstanding the fact that it was submitted before them would render the order passed by the CESTAT perverse, erroneous and incorrect.

- Whether a penalty under Excise Act, 1944 can be imposed by placing reliance only on rough exercise book maintained by the appellants in which recorded entries were only for the period of 1.1.1999 to 16.2.1999, whereas, the payment has been sought for the entire period of 1997-1998 and 1998-1999.
- Whether on the basis of consumption of electricity, a penalty can be imposed under the Excise Act, 1944. It is submitted that the process of taking into account the consumption of electricity is based on the assumed production and it has been considered that the payment has been made on the basis of such assumed/presumed production.
- Whether such flimsy and rickety criterion i.e. entry made in rough exercise book and consumption of electricity can be used as sufficient and just and yardstick for fastening liability on the appellants which is so heavy.
- Whether the respondents have not adhered to the fundamental rule of "Duty to act judicially" when they were proceeding to fasten so heavy a penalty on the appellants.
- Whether non-availability of sufficient incriminating evidence vitiates the entire proceedings.

Section 35-F of the Act is relevant for consideration which is reproduced below:

> **S. 35F. Deposit, pending appeal, of duty demanded or penalty levied.**- Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of

goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the [Commissioner (Appeals)] or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the [Commissioner (Appeals)] or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue.

[*Provided further* that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

From a bare reading of the above provision, it is clear that the appellate Tribunal has jurisdiction and power to pass interim orders who having considered the hardship of the appellants passed the order on 25.4.2006. During course of the argument learned counsel for the appellants could not demonstrate how the order passed by the Tribunal on 25.4.2006 is illegal or incorrect which requires to be corrected by the High Court, even failed to demonstrate as to how the final order passed by the Tribunal due to non-compliance of its directions by dismissing the appeals involve any substantial question of law.

We are of the considered opinion that the appeal does not involve even any question of law, what to say of substantial question of law. In the result, the appeal is liable to be dismissed in limine and is accordingly dismissed.

Sd/-
V.K.Shrivastava
Judge

Sd/-
Dhirendra Mishra
Judge